

Ramesh Vs. State of Maharashtra

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Court : Mumbai

Decided On : Mar-04-2005

Reported in : IV(2006)ACC424

Judge : S.T. Kharche, J.

Appellant : Ramesh

Respondent : State of Maharashtra

Judgement :

S.T. Kharche, J.

1. This criminal revision is directed against the judgment and order dated 13.12.2001 passed by learned Second Ad hoc Additional Sessions Judge in Criminal Appeal No. 53 of 1994, whereby the appeal has been dismissed and the judgment and order of conviction passed by learned Judicial Magistrate, First Class on 13.4.1994 in Regular Criminal Case No. 28 of 1991 (new No. 422 of 1991) convicting the petitioner accused for the offence punishable under Section 304A of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for 1 year and to pay fine of Rs. 2,000, in default, to undergo further rigorous imprisonment for two months has been confirmed.

2. Brief facts are required to be stated as under:

(a) The motor vehicle, i.e., the truck bearing No. MHG 4385 was hired by Vasanta, P.W. 2, for transportation of paddy. On 6.1.1991 at about 6 p.m. the said truck was loaded with 100 to 125 gunny bags of paddy at village Dongargaon. Petitioner-accused was the driver on the said truck. After loading the truck with paddy bags at about 10 p.m. the truck proceeded on the road which lead from Dongargaon to Mul. When the truck was proceeding on the road and when it reached near one temple situated on the outskirt of village Dongargaon the branch of the banyan tree had hit the deceased Paikaji causing him grievous injuries. He succumbed to the injuries on the spot of incident itself.

(b) It is the case of prosecution that the witnesses Manohar Chouke, P.W. 3, Deonath, P.W. 4 and others were allowed to sit on the cabin of the truck when it proceeded from Dongargaon. These witnesses had witnessed the entire incident and they were also the victims because the branch of banyan tree did not spare them when truck was proceeding on the road in a high speed.

(c) Jivankala, P.W. 1, the widow of the deceased Paikaji came to know about this incident when the dead body of her husband was brought into the village and, therefore, she had gone to Police Station, Pathri and lodged the first information report, Exh. 15, at about 13.10 hrs. on 7.1.1991. Police Head Constable Damodar Warkade, P.W. 7, took up the investigation of this crime and visited the spot of incident. He drew spot panchnama in presence of panch witnesses Pandhari Maske, P.W. 5 and Ranganath Bhubade, P.W. 6 and also inquest panchnama of the body and forwarded the same to the Medical Officer for the purpose of post-mortem examination. Post-mortem report reveals that the cause of death was shock due to head injury and injury to the vital organ, i.e., the brain. The Revenue Inspector Kuriwar, P.W. 8, was called upon to prepare the map of the spot of incident which was drawn by him by visiting the spot of incident on 8.1.1991. He recorded the statements of witnesses and on completion of investigation, filed the chargesheet in the Court of Judicial Magistrate, First Class.

3. The prosecution has examined as many as 8 witnesses in order to bring home the guilt at the doors of the accused and relied on direct as well as circumstantial evidence. The defence of the accused is that of total denial. Learned Magistrate,

on appreciation of evidence has recorded the findings that the prosecution has proved beyond doubt that the truck was being driven in a rash and negligent manner by the accused and caused the death of Paikaji not amounting to culpable homicide. Consistent with these findings, he convicted the accused and sentenced him as mentioned above. Being aggrieved by the judgment and order of conviction passed by learned Magistrate, the petitioner-accused had carried appeal before the Additional Sessions Judge. The learned Additional Sessions Judge, on reappreciation of the evidence, has dismissed the appeal on 13.12.1991 and confirmed the findings recorded by learned Magistrate. It is this judgment and order which is challenged in this appeal.

4. Ms. Murthy, the learned Counsel for the petitioner-accused contended that there is concurrent findings recorded by both the Courts below that the death of Paikaji caused because he was hit by the branch of banyan tree which was about 9 ft in height while the truck was proceeding on the road. She further contended that the road on which the truck was proceeding was rough having ditches and the time of the accident was around 2 to 3 o'clock in the night and the driver was not rash and negligent in driving his vehicle. She contended that the truck was proceeding on the left side of the road and accused was not expected to know that the branch of banyan tree would hit the deceased and, therefore, there is no nexus between the cause of death and the accident. She contended that the principle of *res ipsa loquitur* is not applicable in the facts and circumstances brought on record and, therefore, the prosecution has failed to establish that there was a culpable negligence on the part of the accused. She contended that the cause of the incident was purely accidental. In support of these submissions, she relied on the decision of the Apex Court in the case of Mohammed Aynuddin v. State of Andhra Pradesh : 2000 CriLJ3508 .

5. Learned Counsel for the petitioner-accused further contended that the accused had no control on the banyan tree and, therefore, by application of the principle of *res ipsa loquitur*, it cannot be said that there was a culpable negligence on the part of the accused in driving his truck on the relevant date and time. In support of these submissions, she relied on another decision of the Supreme Court in the case of Syad Akbar v. State of Karnataka 1980 A.C.J. 38 .

6. Learned Counsel for the petitioner-accused further contended that the prosecution witnesses speak about the speed of the truck and according to them the truck was being driven in a high speed. But, merely because the truck was being driven at a high speed does not amount to negligence or rashness by itself. High speed is a relative term and it is for the prosecution to bring on record material to establish as to what it meant by 'high speed' in the facts and circumstances of the case. Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception and as such presumption could be drawn by invoking the maxim *res ipsa loquitur*, there being no evidence on record to establish negligence or rashness in driving the truck by the petitioner-accused. In support of these submissions, she relied on the decision of the Supreme Court in the case of *State of Karnataka v. Satish* : (1998)8SCC493 .

7. The last but not the least submission of the learned Counsel for the petitioner-accused is that the accused is sole bread earner in the family and since 15 years have elapsed from the date of the offence, the benefit of Section 360 of the Code of Criminal Procedure may kindly be given to the accused by releasing him on probation of good conduct, to keep the peace and be of good behaviour. She relied on the decision of the Supreme Court in the case of *A.P. Raju v. State of Orissa* .

8. The learned Additional Public Prosecutor contended that it is not in dispute that truck bearing No. MHG 4385 was being driven by the accused on the relevant date and time and it was loaded with gunny bags of paddy. He contended that the direct evidence of eyewitnesses; Manohar, P.W. 3 and Deonath, P.W. 4, clearly indicate that they accompanied deceased Paikaji and were sitting on the cabin of the truck and when the truck proceeded on the road and came at the outskirts of Dongargaon, a branch of banyan tree had hit all of them. Their evidence would further reveal that deceased had sustained grievous injuries who succumbed to the injuries on the spot itself. He contended that the testimony of these two witnesses is quite consistent with each other and they have also categorically stated that the truck was proceeding in a high speed at the relevant time though the road was rough and there were some ditches on the road. He contended that

the Courts below have concurrently recorded the findings that the deceased Paikaji died due to the injuries caused to him because he was hit by the branch of banyan tree and that the rashness and negligence is apparent on record and lies in the fact that the accused allowed the deceased Manohar, P.W. 3 and Deonath, P.W. 4, along with others to sit on the cabin of the truck which was not meant for carrying of passengers. He contended that petitioner-accused has failed to exercise proper care and skill in driving the said truck and his conduct in not taking the injured persons to the hospital also is a relevant circumstance which has been taken into consideration by both the Courts below. He, therefore, supports the impugned judgment and order of conviction recorded by the learned Magistrate which has been confirmed by the Additional Sessions Judge, in appeal. He contended that in such circumstances, no case has been made out for interference and this revision may kindly be dismissed.

9. This Court has given thoughtful consideration to the contentions canvassed by learned Counsel for the parties. It is necessary to reproduce Section 304A of Indian Penal Code, which contemplates as under:

304A. Causing death by negligence--Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

In order to attract the aforesaid section, the prosecution is required to prove--(i) that the accused had caused the death of any person; (ii) that such death was caused by the accused doing any rash act or that such death was caused by the accused--doing any negligent act; and (iii) that such a death did not amount to culpable homicide. In order to attract this provision of law, the prosecution is required to prove that, (i) it is the accused who did some act which was rash or negligent; (ii) it entailed death of any person; (iii) this death is the direct result of the rashness or negligence; (iv) that this rash and negligent act did not amount to culpable homicide.

10. In Mohammed Aynuddin v. State of Andhra Pradesh (supra), the Apex Court has observed as under:

(7) The principle of *res ipsa loquitur* is only a rule of evidence to determine the onus of proof in actions relating to negligence. The said principle has application only when the nature of the accident and the attending circumstances would reasonably lead to the belief that in the absence of negligence the accident would not have occurred and that the thing which caused injury is shown to have been under the management and control of the alleged wrong-doer.

(8) A rash act is primarily an over hasty act. It is opposed to a deliberate act. Still a rash act can be a deliberate act in the sense that it was done without due care and caution. Culpable rashness lies in running the risk of doing an act with recklessness and with indifference as to the consequences. Criminal negligence is the failure to exercise duty with reasonable and proper care and precaution guarding against injury to the public generally or to any individual in particular. It is the imperative duty of the driver of a vehicle to adopt such reasonable and proper care and precaution.

11. In the case of *Syad Akbar v. State of Karnataka* (supra), it is observed that:

As a rule, mere proof that an event has happened or an accident has occurred, the cause of which is unknown, is not evidence of negligence. But the peculiar circumstances constituting the event or accident, in a particular case, may themselves proclaim in concordant, clear and unambiguous voices the negligence of somebody as the cause of the event or accident. It is to such cases that the maxim *res ipsa loquitur* may apply, if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant...in such cases the event or accident must be of a kind which does not happen in the ordinary course of things if those who have the management and control use due care...and it has to be further satisfied that the event which caused the accident was within the defendant's control. The reason for this second requirement is that where the defendant has control of the thing which caused the injury, he is in a better position than the plaintiff to explain how the accident occurred.... Thus, for the application of the maxim *res ipsa loquitur* no less important a requirement is that, the *res* must not only be speaking negligence, but pin it on the defendant.

12. In the case of State of Karnataka v. Satish (supra), the Supreme Court held that:

Merely because the truck was being driven at a 'high speed' does not bespeak of either 'negligence' or 'rashness' by itself. None of the witnesses examined by the prosecution could give any indication, even approximately, as to what they meant by 'high speed'. 'High speed' is a relative term. It was for the prosecution to bring on record material to establish as to what it meant by 'high speed' in the facts and circumstances of the case.... Criminality is not to be presumed, subject of course to some statutory exceptions. There is no such statutory exception pleaded in the present case. In the absence of any material on the record, no presumption of rashness' or 'negligence' could be drawn by invoking the maxim 'res ipsa loquitur'.... There being no evidence on the record to establish 'negligence' or 'rashness' in driving the truck on the part of the respondent, it cannot be said that the view taken by the High Court in acquitting the respondent is a perverse view. Hence, the same calls for no interference.

13. There cannot be any quarrel with the ratio laid down by Apex Court in the aforementioned cases on which reliance is placed by the learned Counsel for the petitioner-accused. In Mohammed Aynuddin's case : 2000 CriLJ3508 , a passenger while boarding the bus, fell down as the vehicle moved forward and the bus driver was held guilty of culpable homicide in that episode. In Syad Akbar's case 1980 A.C.J. 38 (S.C.), the appellant-accused was driving passenger bus and was proceeding from a kaccha path and while proceeding on the extreme right side of the road had hit a child who succumbed to the injuries at the spot. Such is not the present case. In the present case petitioner-accused was driving the goods truck bearing No. MHG 4385 which was not meant for carrying passengers.

14. The Courts below were perfectly justified in recording the findings that allowing the passengers to travel on the cabin of the truck itself would show that the act of the accused would amount to culpable rashness and negligence which lies in running the risk of doing the act with recklessness and with indifference as to the consequences. The driver had failed to exercise the duty with reasonable and proper care and precaution regarding the injury caused to Paikaji who died on the

spot itself because he was hit by a branch of banyan tree. The height of the branch of banyan tree was about 9 ft. from the ground level and it is apparent that the persons sitting on the cabin were bound to receive injury because of the hit by the branch of tree considering the height of the truck itself. Moreover, the truck was overloaded with gunny bags filled with paddy and the truck was proceeding on the kaccha road.

15. It is, in these circumstances, the speed of the truck assumes importance and when the eyewitnesses Manohar, P.W. 3 and Deonath, P.W. 4, have categorically stated that the truck was being driven in a high speed, it follows that the driver was not driving the truck with due care and skill. It is true that merely because the truck was being driven at a high speed does not bespeak of either negligence or rashness by itself and it would not lead to the conclusion that the driver was negligent. But, then it is not the only circumstance on which the reliance is placed by the prosecution.

16. The contention of learned Counsel for appellant-accused that the truck was proceeding on the left side of the road and the accused was not expected to know that the branch of the banyan tree would hit the deceased cannot be accepted for the simple reason that he was not supposed to allow any passenger either in the truck or on the cabin of the truck and, therefore, it is obvious that in such circumstances, the principle of *res ipsa loquitur* would be squarely applicable in this case. The maxim applies in actions for negligence where the circumstances of an accident are such that it is so improbable that it would have occurred without the negligence of defendant, that it can be presumed that it was so caused. In the present case the circumstances are such that it is impossible to reach the conclusion that the accident could have occurred without the negligence of the petitioner-accused. There was no intervention by any outside agency at the time of accident and since the driver did not exercise his due care and caution, it has resulted in causing the death of Paikaji. It is, therefore, not possible to accept that there is no nexus between the death of Paikaji and this accident. In such circumstances, this Court is of the considered opinion that no case has been made out for interference into the impugned judgment and order of conviction passed by the learned Magistrate which has been rightly confirmed by the Second Ad hoc

Additional Sessions Judge.

17. The next submission of the learned Counsel for the appellant-accused is that accused may be given benefit of Section 360 of the Criminal Procedure Code and in support of this submission, she relied on the decision of this Court in the case of Sanjay v. State of Maharashtra 1992 (2) Mh.L.J. 613 and submitted that decision of the Apex Court in the case of Nand Ballab Pant v. State (Union Territory of Delhi) : AIR 1977 SC892 , was also referred by this Court in the aforementioned case. That was the case wherein a young boy of 24 years was driving the tractor and taking into consideration the facts and circumstances, this Court had reduced the sentence of imprisonment already undergone and in lieu thereof enhanced the fine from rupees one thousand to rupees five thousand. In the present case, petitioner-accused is a driver by profession and was driving the truck on the relevant date and time. The evidence brought on record would clearly show that the death of Paikaji was the result of rash and negligent act of the accused in allowing the passengers including Paikaji to sit on the cabin and not exercising due care and caution. In such circumstances, this Court is not inclined to grant benefit of Section 360 of the Code of Criminal Procedure to the accused especially when the truck is a goods vehicle and the appellant-accused is not supposed to carry the passengers.

18. In the result, the revision fails and stands dismissed. The petitioner-accused shall surrender to his bail and shall appear before learned Judicial Magistrate, First Class on 17.3.2005 and on his appearance, the learned Magistrate shall commit him to the prison for undergoing the sentence. In case, if he fails to appear within time, the learned Magistrate shall secure his presence through the Superintendent of Police and then shall commit him to the prison for undergoing the sentence.

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